4 days old and the new Arbitration Act is already having an international impact. Last Wednesday, when googling Arbitration Ireland to look at the website of our new association to promote Ireland as a venue for international arbitration, I came across a website of a lawyer in Miami from the Cueto Law Group. He has written a short article summarising the new Act in glowing terms. After referring to Ireland as being both "pastoral and progressive at the same time" he goes on:

"While holding strong to its English common law heritage, I found that Ireland is willing to abolish entire legislative codes that fail to keep up with modern jurisprudence. In keeping with its progressive mandate, Ireland recently passed a new Arbitration Act that removes the distinction between domestic and international arbitration and creates a Swiss style one stop shop for post award court proceedings. [The new Act] ... will be instantly recognisable to lawyers across the globe. The Arbitration Act of 2010 will apply the Model Law to all arbitrations in Ireland and do away with the historical distinction between domestic and international arbitration.”

He concludes his article with the message "Trend to watch: look for a precipitous increase in international commercial arbitrations taking place in Ireland in the next several years.”

The new Act is, in truth, part of what has been described as "a trend towards delocalization of arbitral law [which] has been underway for the last 50 years, starting with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards." However, one of the more problematic concepts for the goal of greater uniformity in arbitration law across the jurisdictions is the public policy defence to the enforcement of arbitration awards. It is not always obvious what public policy means or what sort of public policy it is permissible to set up.

---

*Senior Counsel, Bar of Ireland; Chairman of the Bar Council of Ireland; Adjunct Professor of Law, Law School, UCD; Member of Monckton Chambers, London.

Arbitration is a private game, played behind closed doors between consenting adults. Indeed, the privacy of the process is for some parties its principal attraction. But clearly the process has to intersect with the apparatus of the State, and in particular courts, if the process is to deliver a binding and enforceable result. Courts support the arbitral process in a number of different ways most particularly in recognising and enforcing the award. Every system of arbitration law contains some rules about the circumstances under which an award can be annulled. Annulment provisions are not, in themselves, in any way hostile to the arbitral process. On the contrary, it is precisely to ensure the integrity of the arbitral process that there must always be some mechanism whereby an award can be annulled where there is, in broad terms, some manifest and fundamental defect in the underlying arbitration proceedings.

That is entirely different from the sort of hostility which English courts used to have to the idea of arbitrators being a law unto themselves, exemplified in the remark of Scrutton L.J. in Czarnikow –v- Roth Schmidt & Co. (1922) 2 KB 478 "that there must be no Alsatia in England where the King’s writ does not run." However, judicial annulment of arbitration awards must necessarily be exceptional because the very nature of the agreement to arbitrate carries the necessary implication that the parties accept that they must live with a broad range of errors and mistakes which may occur in the arbitration. By agreeing to arbitrate, the parties have already made the value judgment that the risks of such mistakes are outweighed by the anticipated benefits of privacy, speed, expertise on the part of the decision-maker and, most importantly in the present context, finality. Irish courts have long recognised and accepted that these policy considerations mean that judicial annulment or setting aside of an arbitration award is wholly exceptional.

This judicial attitude is now firmly entrenched as legislation by virtue of the adoption of the UNCITRAL Model Law in Ireland and in particular by the adoption of the very restricted grounds for annulling an award as set out in Article 34 which in turn is modelled on Article V of the New York Convention. The ground for annulment I wish to consider is the public policy ground contained in Article 34(2)(b)(ii) of the Model Law which provides that the Court may
annul the award if it finds that “the award is in conflict with the public policy of this State.” While there is pretty much universal agreement that this provision has to be interpreted restrictively Jan Paulsson has observed that the exception “has been interpreted erratically by the courts and is probably the most misused ground [for annulment] of all.”

The complexities of the public policy exception are reflected by the fact that the Committee on International Arbitration of the International Law Association spent 6 years considering the public policy exception under the chairmanship of Professor Pierre Mayer with Audley Sheppard as Rapporteur. They produced an interim report in 2000 and a final report (“the ILA report”) in 2001 setting out recommendations as to the application of public policy by state courts.

In the 50 years since the New York Convention there has been a significant and to a certain extent successful attempt to bring about a trans-national standardisation of international commercial arbitration and in particular the terms upon which different countries in the world will recognise and enforce arbitral awards without subjecting them to scrutiny on their merits. By signing up to the New York Convention, the signatories create a passport-free zone within which awards coming from any of the signatory countries are presumptively recognised as valid and enforceable in all the other countries. This passport-free zone is constantly expanding as more nations sign up to the Convention and this standardisation is both reflected in and enhanced by the increasing number of countries which have adopted the UNCITRAL Model Law on international commercial arbitration. Ireland’s adoption of the Model Law not merely for international arbitrations (which, of course, it did some years ago) but for domestic arbitrations also lies firmly in the mainstream of this current of standardisation.

The reason the public policy exception is both so complex and so important is that it is the mechanism by which the cultural and policy conflicts which inevitably arise between the trend

---


3 There is a distinction between the public policy issues which may face the arbitral tribunal itself and the public policy issues which may be invoked before a court in the context of the enforcement or annulment of the award and I am only concerned today with the latter.
towards delocalisation which I have described and the fundamental concerns of individual States can be recognised. Professor Christopher Gibson has noted:

“*The arbitration community generally, of which the ILA Committee is a representative, has concerns for the effectiveness and legitimacy of the international arbitral system. The members of the community are the cross-cultural custodians that give arbitration its coherent vision and globalising force. Indeed, the ILA Final Report is a reflection of the arbitration system seeking to internalise its own regulatory function. ... Society at large has a significant stake both in the international arbitration system and in the public policy defence to enforcement, which serves to give effect to important underlying societal values. Thus, to build a civilisation of arbitration, public policy works for all of the stakeholders and must be given expression both within the arbitral procedure itself and if necessary, by supervising courts at the stage of recognition and enforcement.*”

Fundamental to the effectiveness of global enforcement of arbitral awards is the recognition of the exceptional nature of the public policy exception. Thus, in *Eco Swiss China Time Ltd. – v- Benetton International NV* (1999) ECR I-3055, the European Court of Justice stated:

“... *It is in the interest of efficient arbitration proceedings that a review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.*”

Importantly, the public policy at issue is the public policy of the State where it is sought to enforce the award and not the State where the arbitration was conducted or the State of the law governing the contract or the home jurisdiction of either of the parties to the contract.

However, this does not mean that every aspect of domestic public policy can be invoked in an attempt to resist enforcement of an award. The ILA report uses the term "*international public policy*” to mean “*that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award. It is not to be understood ... as referring to a public policy which is common to many states (which is better referred to as “transnational public policy”) or to public policy which is part of public*

---

international law. International public policy is generally considered to be narrower in scope than domestic public policy.”

In this jurisdiction, the Irish High Court has readily accepted the wholly exceptional and limited nature of the public policy exception and indeed has expressly adopted the often cited US decision in Parsons and Whittemore to the effect that enforcement should be denied on the basis of the public policy exception “only where enforcement would violate the forum state’s most basic notions of morality and justice.” The leading Irish decision is Brostrom Tankers –v- Factorias Volcano (2004) 2 IR 191 dealing with section 9(3) of the Arbitration Act 1980 which was concerned with the enforcement of New York Convention awards and contained the public policy exception. The underlying contract was between a Swedish ship owner and a Spanish company which agreed to construct a chemical tanker for the ship owner. The contract was governed by Norwegian law and the arbitration of the dispute which arose took place in Oslo. The Swedish company succeeded and sought to enforce the award against the Spanish company in Ireland because the Spanish company had a debtor in Ireland which the Swedish company hoped to make subject to a garnishee order. The Spanish company resisted the enforcement on the basis that it had obtained a form of court protection in Spain, the effect of which was to limit the Defendant’s liability to its creditors to 10% of its debts. If the plaintiff successfully garnisheed the debt owing by the Irish company to the Spanish company, the Swedish plaintiff would thereby recover more than 10% of the award which, the defendant claimed, would be contrary to public policy.

There was very extensive affidavit evidence as to both Spanish and Norwegian law (which, of course, had to be proved in the Irish Court as a matter of fact) and a number of very complex issues of Spanish law and Norwegian law appeared to require resolution. However, before embarking on what would have been a very lengthy cross-examination of the expert witnesses as to these issues of foreign law, Kelly J. decided to approach the matter on the assumption, without deciding, that all issues of foreign law were resolved in favour of the defendant and to then consider whether, even on that assumption, the defendant would be

---

5 See also National Oil Corporation –v- Libyan Sun Oil Corporation 733 F.Supp. 800 at 819 (Del., 1990).
entitled to resist enforcement of the award. Had he concluded that the Spanish company would have been entitled to resist enforcement on that basis, the case would then have proceeded and he would have had to hear the evidence and determine the issues of foreign law arising.

However, he concluded that even if all those issues were decided in favour of the Spanish defendant, there was no basis upon which the enforcement of the award could be resisted. He stated as follows:

"I am satisfied that there are strong public policy considerations in favour of enforcing awards. That is no less so in the case of New York Convention awards. Indeed, in Redfern and Hunter’s Law and Practice of International Commercial Arbitration (3rd edition) the authors speak of most countries faithfully observing what is described as the pro-enforcement bias of the New York Convention. Such a leaning in favour of enforcement must not, of course, stand in the way of refusal if such is required as a matter of public policy.

I am satisfied that the public policy referred to in section 9(3) of the Arbitration Act 1980 is the public policy of this State. That is clear, in my view, from the wording of Article 5(2)(b) of the New York Convention which is set out in the first schedule to the Act of 1980. [He then quoted the Article].

Reference there to “that country” means in this case Ireland, this State. ...

I am quite satisfied that a refusal of an enforcement order on grounds of public policy would not be justified in this case. To do so would extend to a very considerable extent to the notion of public policy as it has come to be recognised in the context of the enforcement of an arbitral award. The caselaw and the textbook writers make it clear that the public policy defence to an enforcement application is one which is of narrow scope. It extends only to a breach of the most basic notions of morality and justice. In this regard, I derive considerable assistance from the decision in Parsons and Whitmore Overseas Co. Inc. –v- Societe Generale de l’Industrie du Papier 508 F2d 969 (2nd Circuit, 1974) [a decision of Circuit Judge Joseph Smith]. In the course of his judgment, Judge Smith says this, and I quote:

"Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias in forming the Convention and explaining its supersession of the Geneva Convention points towards a narrow reading of the public policy defence. An expansive construction of
this defence would vitiate the Convention’s basic efforts to remove pre-existing obstacles to enforcement.

Additionally, considerations of reciprocity – considerations given express recognition in the Convention itself – counsel courts to invoke the public policy defence with caution lest foreign courts frequently accept it as a defence to enforcement of arbitral awards rendered in the United States. We conclude, therefore, that the Convention’s public policy defence should be construed narrowly.

Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State’s most basic notions of morality and justice.”

I am satisfied that a broad interpretation, such as is contended for by the defendant, would defeat the Convention’s purpose of permitting parties to international transactions to promote neutral dispute resolution. The issue is dealt with in this fashion in Redfern and Hunter under the heading “Public Policy” paragraph 10(46):

"Recognition of enforcement of an arbitral award may also be refused if it is contrary to the public policy of the enforcement state. It is understandable that a state may wish to have the right to refuse to recognise and enforce an arbitration award that in some way offends the state’s own notions of public policy. Yet, when reference is made to public policy, it is difficult not to recall the sceptical comment of the English judge who said more than a century ago: "It is never argued at all but where other points fail."

I am of opinion that I will be justified in refusing enforcement only if there was (as is stated in Cheshire & North’s Private International Law 13th edition): “some element of illegality, or that the enforcement of the award would be clearly injurious to the public good, or possibly that enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public.”

This case comes nowhere near that position. There is no illegality or even suggestion of illegality, nor are any of the other elements even remotely demonstrated. I am satisfied that there is no aspect of Irish public policy which would justify a refusal of an enforcement order, even assuming that all of the foreign legal questions are decided in favour of the defendant.
That being so, I am satisfied that this is an award which should be enforced and that the attempt to resist its enforcement on the basis of its being contrary to Irish public policy fails.”

It is important to observe Kelly J.’s reference to “the notion of public policy as it has come to be recognised in the context of the enforcement of an arbitral award” and the underlying purpose of the Convention. This, allied to his unqualified adoption of the authorities and textbooks to which he referred makes clear that it is not all aspects of Irish public policy that can be invoked under the Model Law but only that more limited subset of public policy considerations which are consistent with applicable international law principles along the lines of the ILA report’s concept of “international public policy.” The different nuances here are well-captured by Gary Born in his 2-volume work on international commercial arbitration where he states as follows:

“Considerable debate exists as to the definition of what constitutes “international” public policy. As discussed elsewhere, different authorities have variously concluded that the concept refers to an autonomous body of international public policies, derived from international source and State practice; to those public policies of the forum State that are considered applicable in international contexts; or to those public policies of the forum intended for international settings, but only insofar as that public policy is consistent with applicable international principles. The better view in the annulment context is the final one, which is consistent with the character of public policy as an escape mechanism, but subject to the structural limitations of the New York Convention.

As discussed below, the national public policies that a particular State considers to have international application are typically said to be a narrower, more limited category of matters than apply in domestic matters. The rationale is that only matters which are essential to the forum State’s legal system, and considered mandatory even in international or transnational settings, will constitute international public policy.”

---

6 Born, International Commercial Arbitration Volume 2 (2009) pages 2622-2623. He goes on to say that “National courts may also give effect in annulment actions to the public policy of the foreign State, provided applicable conflicts rules support such a result. This approach is appropriate only in exceptional cases, where local public policies demand giving effect to a foreign State’s public policy, notwithstanding both the absence of any independent local public policy and the Convention’s general objectives of facilitating the recognition and enforcement of international agreements to arbitrate and arbitral awards.”
The ILA report draws a helpful distinction between procedural international public policy and substantive public policy. Breaches of procedural public policy would include demonstrating that the tribunal lacked impartiality or that the award was induced by fraud or corruption and a breach of the rules of natural justice. "It may also be a breach of procedural public policy to enforce an award that is inconsistent with a court decision of arbitral award that has res judicata effect in the enforcement forum." For example, in England, the courts have held in *Vervaeke v Smith* (1983) 1 AC 145 and *ED &F Man (Sugar) Limited v Haryanto (No. 2)* (1991) 1 Lloyd’s Reports 429 that the principle of res judicata is a rule of public policy but it remains to be seen whether that would necessarily be so in Ireland. It seems to me that the mere fact that an award which is sought to be enforced is a result which is different to the result which would have been arrived at had the issue fallen to be decided under Irish law can hardly be a ground for resisting enforcement of an award which has, ex hypothesi, been decided under some other law, still less contrary to such basic notions of morality and justice as to fall within the public policy exception.

Nor is an incorrect interpretation of substantive law by the arbitrator a ground upon which enforcement should be refused. Even a manifest disregard of the law will not normally provide a ground for resisting enforcement. For example, the US federal courts have held that the manifest disregard standard does not fall within the scope of Article V(2)(b). Citing *Yusuf Ahmed Alghanim & Sons v Toys “R” Us* the ILA Interim Report states:

"To vacate an award for manifest disregard of the law, it has been held that there must be something beyond, and different from, a mere error in the law or failure on the part of the arbitrators to understand or apply the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it."

Examples of substantive public policy cited by the ILA report are the principle of good faith and prohibition of abuse of rights, the prohibition against uncompensated expropriation and

---

7 See, for example, *Adams v Cape Industries plc* (1990) Ch. 433 at 569.
8 See, for example, *M&C Corp v Erwin Behr* 87 F.3d 844 (6th Circuit, 1996).
9 126 F.3d 15 (2nd Circuit, 1997).
prohibition against discrimination. There are, of course, more obvious and extreme examples such as the prohibitions against piracy, terrorism, genocide, slavery, smuggling, drug trafficking and paedophilia.

The report also draws attention to the interest a State has in complying with its international obligations such as a United Nations Security Council Resolution which are immediately binding on Member States.

A difficult issue which arises, particularly on the question of substantive public policy, is the role of mandatory public law. These are rules of law which parties cannot exempt themselves from by a merely private agreement. Donald Donovan has described mandatory rules as those that "arise outside the contract, apply regardless of what the parties agree to, and are typically designed to protect public interests that the State will not allow the parties to waive."  

Competition law would be an example of such a mandatory public law.

This issue has become more complex and important as the concept of what is an arbitrable subject matter expands to include mandatory public law issues. Arbitrators increasingly find themselves faced with issues that were once thought to be the exclusive preserve of courts such as environmental, safety, consumer protection, human health and human rights laws. Increasing economic regulation ranging from competition laws to laws prohibiting bribery, corruption, money laundering and tax evasion are all increasingly finding their way into what parties, arbitrators and courts are prepared to accept as legitimate subjects for arbitration. There is a significant concern that arbitrators may not have the interest, the expertise or the incentive to look after State regulatory interests in the way that a court would when the relevant State authority can normally intervene to assert and defend the relevant State interest. Thus, when the US Supreme Court in Mitsubishi Motors –v- Soler Chrysler – Plymouth Inc. 473 U.S. 614, 638 (1995) permitted arbitration of antitrust claims, it

10 Donovan and Greenawalt, Mitsubishi After 20 Years: Mandatory Rules Before Courts and International Arbitrators, in Pervasive Problems in International Arbitration, 1, 13 (Loukas Mistelis and Julian Lew eds., 2006).
nonetheless built into its decision what has come to be called the Second Look doctrine which
is an attempt to enable courts to still protect US regulatory interests through the public policy
exception. The Court stated that "While the efficacy of the arbitral process requires that
substantive review at the award enforcement stage remains minimal, it would not require
intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and
actually decided them." It then added in the famous footnote 19 that "In the event that the
choice of forum and choice of law clauses operated in tandem as a prospective waiver of a
party’s right to pursue statutory remedies for antitrust violations, we would have little
hesitation in condemning the agreement as against public policy."

While I am primarily concerned to address the question of how these issues feed into the
public policy exception at the enforcement stage, I should note that there is still significant
debate as to whether claims based on mandatory public law are arbitrable at all; even if they
are whether the arbitral tribunal has any jurisdiction to entertain such claims, particularly if
the public law issue at stake does not derive from the law chosen by the parties; and whether
or not the arbitrator has the interest, expertise or incentive to properly apply the public law in
question. The difficulty is however that in the real world, the effective resolution of the
dispute may be intimately entangled with just such public law issues and it may be
profoundly unsatisfactory to attempt to have the private law issues decided by an arbitrator
and the public law issues decided by a court. Put simply, the parties knew the nature of their
business, knew that these types of public law issues could arise, and having agreed on
arbitration, the principle of party autonomy would seem to require that the arbitrator should
have jurisdiction to deal with such public law issues.

In the context of enforcement, there are conflicting decisions as to whether the public policy
exception is triggered by a foreign mandatory rule but the predominant view, which I
diffidently suggest is the better view, is that the existence of foreign mandatory rules should
not be sufficient to enable the public policy exception to be invoked.

Three English decisions, to somewhat different effect, will illustrate the problem. In
Soleimanay –v- Soleimanay (1999) QB 785, a father and son entered into an agreement with
each other to export Persian carpets from Iran. Following the inevitable falling out, an arbitration award of the Court of Chief Rabbi in London was made in favour of the son but the award noted expressly that the carpets had been exported out of Iran in violation of Iranian revenue and export controls. In the enforcement proceedings, the English Court of Appeal declined to enforce the award stating:

"An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the laws of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country ... The rule applies as much to the enforcement of an arbitration award as to the direct enforcement of a contract in legal proceedings."\(^1\)

However, a somewhat different result was arrived at in *West Acre Investment v Jugo Import* (2000) QB 288 where a Swiss arbitration award was enforced notwithstanding the fact that the underlying contract involved paying bribes to Kuwaiti officials contrary to Kuwaiti public policy. The issue of illegality had been raised and rejected by the arbitral tribunal as the relevant agreement was governed by Swiss law and did not violate Swiss public policy.

In *Omnium de Traitement v Hilmarton* (1999) 2 Lloyd’s Reports 222, the underlying consultancy contract was unlawful in Algeria, the place of performance, involving as it did a middleman prohibited under Algerian law. However, the contract was governed by Swiss law and the place of arbitration was Switzerland. Since the contract was not unlawful under Swiss law, the English Court of Appeal enforced the award despite the fact that the underlying contract was illegal in the place of performance of the contractual obligations.

It is noteworthy that the Irish decision in *Brostrom Tankers* to which I referred above involved a mandatory public foreign law (the Spanish bankruptcy law) but the Irish Court was still prepared to enforce the Norwegian award as no rule of Irish public policy was implicated. This may be contrasted with the US decision in *Victrix SS Co. v Salen Dry Cargo* 825 S.2d 709 (2nd Circuit 1987) where the Federal Court of Appeal declined to enforce an English

\(^1\) Pages 803-804.
arbitration award attaching assets and an English Court judgment concerning Swedish bankruptcy proceedings on the basis that enforcement of the award would conflict with the public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt company.

On the other hand, in *Telenor Mobile Communications v Storm* 524 F.Supp. 2d 332 (SDNY 2007), the Federal District Court had to consider whether an arbitration award which would compel the violation of Ukrainian law should be enforced. The Court said that in New York State "while the existence of a public policy against enforcement or arbitral awards that compel a violation of [foreign] law is unclear", the award was nonetheless enforced because federal public policy favoured the enforcement of arbitration awards. The Court does however seem to have been influenced by the fact that the Ukrainian law in question was expressed in Ukrainian Court judgments that appear to have been obtained through some form of collusion.

Thus the international trend is largely in favour of enforcing the award irrespective of whether or not a violation of foreign law is involved (unless, of course, that coincides with some fundamental international public policy of the enforcing State). That also seems to be the recommendation of the ILA report and, most importantly of all for present purposes, appears to be unambiguously the position in Ireland in light of the *Brostrom Tankers* decision.

An issue which frequently arises is where the defendant seeks to resist enforcement by relying on a fundamental principle of public policy which he could have raised before the arbitral tribunal but did not do so. Can he be said in those circumstances to have waived his entitlement to rely on the public policy and can, indeed, public policy ever be waived as a matter of principle? This is what Gary Born has described as "a significant but ill-explored subject.” The ILA report states that the parties should be deemed to have waived the right to raise a fundamental principle of public policy as a ground for refusing enforcement in such circumstances. The committee was expressly concerned about defendants seeking to simply delay enforcement especially by raising arguments about infringements of procedural public
policy and they make an analogy with the fact that under Article 13(2) of the Model Law, a challenge to an arbitrator on grounds of bias must be made within a limited time period. However, the report does go on to list a number of recommended exceptions.

First, if the Defendant was not aware of the facts which gave rise to the relevant public policy during the arbitration, he should not be barred from raising it at the enforcement stage.

Secondly, the authors suggest that public policy rules designed to serve the essential political, social or economic interests of the State and the State’s duty to respect its international obligations are matters which can still be raised notwithstanding that they were not raised before the arbitral tribunal.

Gary Born seems to favour the idea that a failure to raise the issue during the arbitration should be a bar to raising it subsequently. While acknowledging that one cannot waive public policies as such, he comments:

"Nonetheless, considerations similar to waiver and estoppel should be relevant to public policy objections to an award. This result is particularly compelling where the asserted public policies are statutory rights granted principally for the protection of particular commercial parties, who ought in principle to be capable of waiving those rights.

The Paris Cours d’appel has held that matters of European Union competition law are capable of what comes close to waiver, if they are not raised during arbitral proceedings. The Court reasoned that failure to raise a public policy defence deprived the reviewing court of an evidentiary record on which to assess the public policy objection and that it was not for the Court to create such a record."

The last issue I want to touch on is whether an arbitration award will be enforced in another jurisdiction even though the courts in the seat of the arbitration have set aside the award. Since Article V(1)(e) of the New York Convention provides that recognition and enforcement "may" be refused if the award has been set aside at the place of arbitration, it follows that

---

13 Page 2362.
the enforcing Court still has a discretion as to whether or not to enforce an award even though it has been annulled. In *Egypt –v- Chromalloy Aeroservices Inc*¹⁴ the Paris Cour d'Appel held that recognition in France of an award which had been annulled by the courts in the place of arbitration would not violate (French) international public policy. A similar result was reached in the United States in proceedings arising from the same dispute¹⁵ although a different view was taken in *Baker Marine Ltd –v Chevront*.¹⁶ In the French decision of *Omnium de Traitement et de Valorisation –v- Hilmarton*, the Cour de Cassation upheld the enforcement of a Swiss award which had been subsequently annulled by the Swiss Supreme Court.¹⁷

The English Court of Appeal has recently left this question open in *Dallah Estate –v- Ministry of Religious Affairs and Government of Pakistan* (2009) All ER (D) 199. The plaintiff was a Saudi company (Dallah) which entered into a memorandum of understanding with the Pakistan government that it would provide services for Pakistani pilgrims to Mecca. Ultimately a formal agreement was entered into but the contracting party on the Pakistani side was a trust entity created by the Pakistani government, apparently for the purpose of entering into the agreement. A subsequent dispute was governed by an ICC arbitration clause and the arbitral tribunal sat in Paris. Dallah had commenced proceedings against the Ministry of Religious Affairs of the Pakistan government rather than the trust entity and the Pakistan government challenged the jurisdiction of the tribunal on the grounds that it was not a party to the agreement. Nonetheless, the tribunal determined that the government was bound by the agreement and awarded Dallah approximately $20m. Dallah sought to enforce the award against assets of the Pakistan government in England but the Court of Appeal declined to give leave to enforce.

Article V(1)(a) of the New York Convention (reflected in section 103(2)(b) of the English Arbitration Act 1996) states that enforcement may be refused if the agreement

---

¹⁴ Decision dated 14th January 1997; reported in (1997) XXII Yearbook 691.
¹⁶ 191 F.3d 184 (2nd Circuit, 1999).
"is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

The contract had not specified any governing law and so the validity of the agreement fell to be determined under French law being where the contract was made. The English Court heard evidence from French law experts and concluded as a matter of French law that the Pakistan government was not bound by the agreement. Dallah had argued that this issue had in fact been decided by the arbitral tribunal (who had concluded that the Pakistan government was bound by the agreement) and the Pakistan government had not sought to challenge the award before the French courts. For the English Court to now permit the Pakistan government to introduce expert evidence as to whether, as a matter of French law, the government was bound, would conflict with the rationale for the enforcement of international arbitral awards.

While I think those arguments are weighty, the Court of Appeal upheld the decision of Aiken J. to the effect that the award would not be enforced because its integrity was fundamentally unsound. Rix L.J. said that "there could hardly be a more fundamental defect than an award against someone who was never a party to the relevant contract or agreement to arbitrate" (paragraph 87). However, this does seem to ignore the fact that the Pakistan government had argued that very point before the tribunal (in order to persuade it that it had no jurisdiction) and the tribunal had ruled as a matter of French law that the government was bound by the agreement. The case is, I understand, under appeal to the UK Supreme Court.

The decision does, I think, show the potential danger of the public policy exception if it is not confined within strict limits along the lines of the recommendations in the ILA report. But the public policy exception remains a pivotal and carefully calibrated gateway between the self-enclosed arbitral process and the varied cultural and political norms across different states the accommodation of which enables arbitration to play an increasingly important role in the globalisation of commerce.
THE POTENTIAL FOR REVIEW OF ARBITRAL AWARDS UNDER THE NEW ACT

Colm Ó hOisín, S.C.
June 12th 2010.

For many lawyers, the most interesting provisions of the new Act are the provisions relating to challenge of awards. The changes in this area are profound. The concepts and terminology which we have long been used to as lawyers are now, like Anglo Irish Bank, in ‘run off’ mode. For all arbitrations commencing after the 8th June 2010 it is the Model Law not the old law that will apply.

The key provisions regarding challenge to an award under the 1954 Act were contained in Sections 36 and 38. Section 36 empowered a Court to remit the award to the arbitrator. The grounds upon which remittal might be ordered were not specified in the Act and might have been seen as unlimited. However, in practice, there was a degree of judicial consensus that the grounds should be interpreted narrowly. Section 38 of the Act permitted the Court to set aside where misconduct on the part of the arbitrator was established. Furthermore, the Courts had also accepted that there was a common law jurisdiction to set aside on the grounds of an error of law on the face of the award:

The legal principles were summarised by McMahon J. in Galway County Council v. Samuel Kingston Construction Limited and Anor [2008] IEHC 429 in a passage which was recited and broadly approved when the matter came on for appeal before the Supreme Court in March of this year. The passage is as follows:

“Both parties accept that an arbitral award can only be challenged in limited circumstances and there is broad agreement as to the principles governing such a challenge, which may be based on sections 38 and 36 of the Arbitration Act 1954 (‘Act of 1954’) or the court’s common law jurisdiction.

First, section 38 of the Act of 1954 provides for the setting aside of an award where “an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured...”. The term ‘misconduct’ has a special meaning in this context. As explained by Jenkins L.J. in London Export Corporation Ltd.
v. Jubilee Coffee Roasting Co. Ltd. [1958] 1 W.L.R. 661 at p. 665, misconduct is “used in the technical sense in which it is familiar in the law relating to arbitrations as denoting irregularity, and not any moral turpitude or anything of that sort”. Similarly, Atkin J., in Williams v. Wallis and Cox [1914] 2 K.B. 478 stated, at p. 485, that the expression “does not necessarily involve personal turpitude on the part of the arbitrator” and that it “does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice”. This passage was recently cited by Fennelly J. in McCarthy v. Keane [2004] 3 I.R. 617, who went on to say, at p. 627, that “the standard or test of misconduct ... would be something substantial, something that smacks of injustice or unfairness”. Examples of misconduct from the case law include refusing to hear evidence on a material issue, adopting procedures placing a party or parties at a clear disadvantage, acting with clear favouritism towards one party, deciding a case on a point not put to the parties or failure to resolve an issue in the proceedings. However, in order to provide the basis for a successful challenge to the arbitral award, the misconduct must reach the high threshold set out above.

Secondly, section 36 of the Act of 1954 provides that, in all cases of reference to arbitration, the Court “may from time to time remit the matters referred or any of them to the reconsideration of the arbitrator or umpire”. According to McCarthy J. in Keenan v. Shield Insurance Co. Ltd. [1988] I.R. 89 at p. 95:

“[s]ection 36 would appear to be the procedure appropriate, for example, to a case of a patent mistake, in monetary calculation, in the giving or not giving of a particular credit, in an award that is on its face ambiguous or uncertain”.

In Portsmouth Arms Hotel Ltd. v. Enniscorthy U.D.C. (Unreported, High Court, 14th October, 1994), O’Hanlon J., in a passage later approved by the Supreme Court in Tobin & Twomey Services Ltd. v. Kerry Foods Ltd. & Kerry Group plc [1996] 2 I.L.R.M. 1, listed four grounds upon which the court was generally considered to be entitled to intervene under this provision: the existence of some defect or error patent on the face of the award, the existence of a mistake admitted by the Arbitrator which he desires to have remitted for correction, the availability of material evidence which could not with reasonable diligence have been discovered before the award was made, and finally misconduct on the part of the Arbitrator, understood to include a situation where there are errors of law on the face of the award. Courts have also remitted awards where there is a “procedural mishap” resulting in unfairness to the parties; thus, for example, in McCarrick v. The Gaiety (Sligo) Ltd. [2002] 1 I.L.R.M. 55, Herbert J. remitted an award because the subject of the reference had been ruled upon without the benefit of submissions from both sides and it would have been inequitable to allow the award to stand.

Thirdly, the court has a common law jurisdiction to set aside or remit an award for an error of law on the face of the record. In Church & General Insurance Co. v. Connolly & McLoughlin (Unreported, High Court, 7th May, 1981), Costello J. stated that “there is no doubt that at common law the Court can either remit or set aside an award if there
is an error of law on its face”. This jurisdiction, according to McCarthy J. in Keenan at p. 96, is limited to “an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged”. In McStay v. Assicurazioni Generali SPA & Anor [1991] 2 I.L.R.M. 237, Finlay C.J. stated at p. 243 that, where an Arbitrator decides a question of law in respect of which the general issue in dispute, but not the precise question of law, is submitted to him, the court “may in its discretion and in particular cases where the decision so expressed is clearly wrong on its face, intervene by way of remitting the matter or otherwise in the interests of justice”. Thus, as noted by Clarke J. in Limerick City Council v. Uniform Construction Ltd. [2007] 1 I.R. 30 at p.43, the jurisdiction is “limited and arises only where the error is ‘so fundamental’ that it cannot be allowed to stand (Keenan v. Shield Insurance Company Ltd.) or ‘clearly wrong’ (McStay v. Assicurazione Generali SPA & Anor)”

The 2010 Act changes all of this. The grounds for setting aside an award are narrowed. An award can no longer be challenged on the grounds of an ‘error of law’. Different terminology is used. There is no mention of ‘misconduct’ – although in practice many of the issues which would previously have been termed ‘misconduct’ fall within grounds recognised by the Model Law.

Under the new Act there are now a specific and exhaustive number of grounds upon which to challenge an arbitral award. There is no scope for any review on any other ground. Article 5 of the Model Law states under the heading, “Extent of Court Intervention”: -

“In matters governed by this law, no court shall intervene except where so provided in this Law.”

Furthermore, Article 34(1) of the Model Law states as follows: -

“Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraph (2) and (3) of this article.”

To the extent, therefore, that there was a common law basis upon which the Courts could exercise supervision over an arbitral tribunal that common law jurisdiction must now be seen as abolished.

Those grounds for recourse against an award set out in Article 34 are essentially repeated in Article 36 of the Model Law as the only grounds upon which a Court may refuse the recognition or enforcement of an arbitral award.
The 2010 Act applies to all arbitrations (excluding those limited under Section 30 of the Act) and which commenced after the coming into force of the Act, namely, the 8th June 2008. Under Article 21 of the Model Law arbitral proceedings are commenced (unless otherwise agreed by the parties) on the date on which the request for that dispute to be referred to arbitration is received by the respondent.

**Why was it necessary to change the grounds?**

Before I examine the grounds for challenge of an award under the Model Law I think it is worthwhile saying something about the reasons for the change.

The 1954 and 1980 Acts were out of step with modern thinking on arbitration and out of step with best international practice.

The UNCITRAL Model Law implicitly recognises as a core principle the autonomy of the parties and the autonomy of the arbitral process. For there to be an arbitration there must be an arbitration agreement. The agreement is an expression of the will of the parties that their dispute be resolved by arbitration rather than through the Courts. By agreeing to arbitration, the parties are agreeing to a final and binding award from which there is no appeal on the merits. They have chosen an arbitrator not the Courts to adjudicate the dispute. They have chosen not to have the facility of an appeal from the decision of the arbitral tribunal.

Appeals to a Court on the merits of a dispute are certainly inimical to the autonomy of the arbitral process. The modern view internationally is that appeals on points of law also offend that principle.
The agreement to arbitrate does not, however, imply that there should be no interaction between the arbitration and the Courts in the seat of that arbitration. The Model law provides at least 10 examples where the Court interacts with the process.\textsuperscript{18}

There are various instances where the assistance of the Court is required to make the arbitration effective. Furthermore, it is generally accepted that there should be a limited degree of supervision by the local Courts of the arbitration on certain well recognised grounds.

**Examples of Assistance by the Courts to the Arbitral Process:**

Article 9 recognises a party may need to seek interim measures from the Court in aid of the arbitration. It provides: -

"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

Likewise, Article 27 recognises that court assistance may be required in taking evidence. This Article provides: -

"The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

The new version of the Model law which is embodied in the Act also includes a reference to Article 17 J – Court-ordered interim measures. It provides: -

"A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this

\textsuperscript{18} Article 8 (mandatory stay); Article 9 (interim measures); Article 11 (appointment of arbitrator by the court if the parties unable to agree); Article 13 (challenge to an arbitrator); Article 14 (arbitrator’s failure or impossibility to act); Article 16(3) (review of tribunal’s preliminary ruling on jurisdiction); Article 17(h) (recognition and enforcement of interim measures); Article 27 (court assistance in taking evidence); Article 34 (setting aside award); Articles 35 and 36 (recognition and enforcement of awards).
State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."  

Section 10 of the 2010 Act confirms that the High Court has the same powers in relation to Articles 9 and 27 as it has in any other action or matter before the Court. There are two exceptions to this. An order relating to security for costs and an order for discovery of documents are specifically excluded (unless the parties have agreed otherwise).

**Supervision by the Courts:**

There is clearly a tension between the conflicting interests of arbitral autonomy and the need for a degree of supervision. As stated by the respected commentator W. Michael Reisman in *Systems of Control in International Adjudication & Arbitration* at page 113 as follows:

> Too much autonomy for the arbitrators creates a situation of moral hazard..... But too much national judicial review will transfer real decision power from the arbitration tribunal, selected by the parties .... Each of these possible developments would ultimately reduce the attractiveness of arbitration as a private means of dispute resolution."

The key question is where to draw the line. The new Arbitration Act reflects a view that the balance in Ireland was too far on the side of judicial supervision.

It has to be said that the Irish Courts have on many occasions avowed a reluctance to interfere with arbitral awards.

---

19 Article 17(2) defines an interim measure as “any temporary measure, whether in the form of an award or in another form, by which at any time prior to the issuance of the award by which the dispute is finally decided the arbitral tribunal orders a party to:
(a) maintain or restore the status quo pending determination of the dispute;
(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) preserve evidence that may be relevant and material to the resolution of the dispute.”
In his Supreme Court Judgment in the **Galway County Council v. Samuel Kingston Construction Ltd & Anor.** [2010] IESC 18, delivered in March of this year, Mr. Justice O’Donnell stated: -

"Whilst it may only be a matter of semantics, I do not think that it is particularly helpful to describe the modern approach of the Irish Courts to the review of arbitral awards as “deference” or at least “curial deference” a phrase which has become popular in the public law field in the last 15 years. If there is deference, it is not to the arbitrator, but to the parties’ choice of a process which values certainty and speed above technical correctness, and which recognises that correctness is itself the matter upon which courts and judges might reasonably differ. The scheme thus created (and chosen by the parties) has a relatively high tolerance for matters which upon close inspection might be revealed to be errors of procedure, fact, evidence or law."

Notwithstanding this reluctance, the fact remained that the law permitted the Court to interfere with an award where the arbitrator had made a ‘fundamental error of law’. Deciding what was sufficiently fundamental created a degree of difficulty as recognised by O’Donnell J.

"......, if there is now a general approach which requires not just that there be an error, but the error be so serious and fundamental as to justify remittal or setting aside, it is I think necessary also to recognise the difficulty of the application of any such test which is essentially qualitative, and necessarily subjective. The identification of an error of law may involve a process of sometimes precise analysis of legal reasoning with which Courts and lawyers are familiar. That reasoning process is, or ought to be, readily accessible so as to persuade the parties and the observer of its correctness, or at least to facilitate reasoned analysis and criticism. The determination of whether any such error is so fundamental as to necessitate remittal is a different exercise which may in any particular case be unsatisfactorily opaque. It is easy to state the test – and there are other similar examples elsewhere in the law – but it is more difficult to apply it in particular circumstances and even more difficult to explain its application. Counsel for the Appellant suggested in argument that it was ultimately simply a matter for intuition. Lawyers could look at any particular award and agree that it was so wrong and so fundamentally in error that it could not be allowed to stand. This summons up a picture of comforting collegial agreement, which is not in my view sufficient. It is decidedly unsatisfactory for the losing party to be told that the reason of the decision was simply the intuition of the judge or perhaps a majority of judges. Decision making that does not explain and cannot be interrogated, but is simply announced as the product of lawyerly intuition, is apt to slide
imperceptibly into arbitrariness. Furthermore, if the decision is essentially subjective then the test may well become counter-productive. The inevitable uncertainty and unpredictability of such a subjective test will encourage challenges to awards especially when significant sums of money are involved, rather than discourage all but the most serious challenges, which the policy considerations identified in Keenan would suggest. Uncertainty and unpredictability coupled with the inevitable delay created by proceedings creates an incentive to launch challenges in the hope of forcing a settlement. This is the very antithesis of the policy identified in Keenan. Accordingly I would suggest that it is important that the Courts in considering challenges to arbitral awards should firstly remind themselves of the high tolerance that the system of arbitral review has for arbitral error and furthermore should seek to articulate as fully as possible the consideration of law and policy, and the analysis of the individual proceedings, which lead the Court to conclude that in any given case a substantial error has or has not been established which is so fundamental that the proceedings cannot be allowed to stand.”

Applications to set aside under Article 34:

I will shortly examine each of the four grounds for setting aside under Article 34(2)(a). Michael Collins, S.C., will, later on this morning, examine the two grounds under Article 34(2)(b). Before doing so, however, there are a couple of preliminary points that should be made. An application to set aside must be made within three months of the award (Article 34(3)). That is modified in respect of applications to set aside on the grounds of public policy where the period is designated as 56 days “from the date on which the circumstance giving rise to the application became known or ought reasonably to have become known to the party concerned.”

The second point is that under Article 34(4) there is an equivalent to remittal of the award. The sub-article provides:

“(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside.”
Perhaps most significantly, however, the fact that the Court to whom an application to set aside is made retains a residual discretion not to set aside the award even though one of the grounds specified in Article 34(2)(a) or (b) is established.

It is also important to note that a party may be deemed to have waived the ground upon which the set aside is sought. Article 4 of the Model Law provides:

“A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.”

DISCUSSION OF THE VARIOUS GROUNDS FOR SETTING ASIDE UNDER ARTICLE 34:

Article 34 of the Model Law provides as follows:

“(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State, or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

20 It is clear from the travaux préparatoires that it is the intention that such a waiver mentioned in Article 4 would extend to the setting aside proceeding and preclude reliance on the waived objection at that stage. Section 8(1) of the Act states that judicial notice shall be taken of these documents.
(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provision of this Law from which the parties cannot derogate or, failing such agreement, was not in accordance with the Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the Law of this State, or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside.”

The grounds for setting aside under Article 34 are largely identical to the grounds upon which the enforcement of an arbitral award may be refused as set out in Article 36 – the only difference being the addition in Article 36 of an additional ground, namely -

“(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;”

Article 36 itself derives from and is in very similar terms to Article (v) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.21

21 “(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:–
I propose now to look at the four different grounds specified in Article 34(2)(a).

1. Article 34(2)(a)(i) - Incapacity of one of the parties or invalidity of arbitration agreement

“(i) A party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State;”

**Incapacity:**

The law on capacity differs from country to country. Unless the parties have subjected the arbitration agreement to a particular law, capacity will be determined in accordance with the law of the country of the place of arbitration. In Ireland, issues of capacity of contract may arise in relation to minors, prisoners, persons of unsound mind and intoxicated persons. Likewise, issues of capacity may arise in relation to a company if the contract into which the
company has entered is *ultra vires*, i.e., outside the objects contained in the Memorandum of Association.\(^\text{22}\)

**Invalid agreement:**

A claim that the arbitral tribunal had no jurisdiction at all to deal with the matter may arise on this ground. This was the basis of the challenge in the case of the *Arab Republic of Egypt v. Southern Pacific Properties and Others*\(^\text{23}\) In that case an award of an ICC Tribunal was successfully argued by the Egyptian Government on the basis that it was not a party to the relevant agreement and was not bound by the arbitration clause.

Another example of invalidity, albeit in the context of enforcement, arose in the case of *Fougerolle SA (France) v. The Minister for Defence of the Syrian Arab Republic*\(^\text{24}\) where the administrative tribunal of Damascus refused enforcement of two ICC awards holding that they were "*non-existent because they were rendered without the preliminary advice on the referral of the dispute to arbitration, which must be given by the competent committee of the council of state*"\(^\text{25}\).

2. **Article 34(2)(a)(ii) - Lack of due process:**

"(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"

\(^{22}\) There are protections in Ireland to parties acting in good faith (Regulation 6 of the European Communities (Companies) Regulations 1973 or without actual notice (Section 8 of the Companies Act 1963, which allows enforcement of a contract notwithstanding the *ultra vires* act of the company).


\(^{24}\) Vol. XV (90) Yearbook Commercial Arbitration 515

\(^{25}\) There is some discussion of the equivalent invalid award ground under the New York Convention in the Irish case of *Peter Cremer GmbH & Company v. Co-Operative Molasses Traders Limited*, High Court, unreported, 25\(^\text{th}\) February 1985, and Supreme Court, unreported, 11\(^\text{th}\) July 1985. There was an issue in that case as to whether or not there was actually any contract between the parties. Unfortunately, the Supreme Court, instead of dealing with the matter under Article V(1)(a) of the New York Convention preferred to introduce a preliminary test as to whether in fact there was an award in the first place within the meaning of Section 6(1) of the 1980 Act.
It has been described as probably the most important ground for recourse against an award under the Model Law. According to Redfern and Hunter\textsuperscript{26}: -

"Certain minimum procedural standards must be observed if international commercial arbitrations are to be conducted fairly and properly. These procedural standards are designed to ensure that the arbitral tribunal is properly constituted; that the arbitral procedure is in accordance with the agreement of the parties (subject to any mandatory provisions of the applicable law); and that the parties are given proper notice of the proceedings, hearings and so forth. In short, the aim is to ensure that the parties are treated with equality and are given a fair hearing, with a full and proper opportunity to present their respective cases."

This ground is concerned with a lack of due process in the course of the arbitral proceedings. Three specific instances are given.

The first two of these appear relatively narrow and quite specific in contrast to the third instance which is potentially quite wide and really touches on whether or not there was a fair hearing. Whilst there are obviously differences internationally as to precisely what is required for a fair hearing, there are certain basic principles on which most lawyers agree. It is worthwhile looking at case law to see some examples of the approach of Courts in different countries as to the issues of proper notice and fair hearing.

\textbf{Example 1:}

A German Court refused to allow the enforcement of an award rendered in Denmark on the grounds that the German party against whom the award was sought to be enforced had not been given the names of all of the members of the arbitral tribunal but merely of the chairman. The award had been given under the Copenhagen Arbitration Committee for Grain and Feedstuffs Trade According to the German Court, this meant that the German party had not been given proper notice of the appointment of the arbitrators.\textsuperscript{27}

\textbf{Example 2:}

\textsuperscript{26} Law and Practice of International Commercial Arbitration. Redfern, Hunter, Blackaby and Partasides (4\textsuperscript{th} Edition), paragraph 9-21.

\textsuperscript{27} The case is reported in (1982) VII Yearbook Commercial Arbitration 345 at 346.
In *Corporacion Transnacional de Inverstones, SA de CV v. Stet International S.p.A and Stet International Neterlands N.V.*\(^{28}\) the Ontario Superior Court of Justice refused to set aside an award made against a number of Mexican companies, only some of whom had signed the agreement in which the arbitration clause was contained. The arbitral tribunal found it had jurisdiction over all of the Mexican respondent companies including the non-signatories of the agreement. Thereafter, the respondents boycotted the arbitration and after the award was rendered they sought to have it set aside on the grounds, *inter alia*, that they had been denied a full opportunity to present their case. The Ontario Superior Court of Justice held that in order to justify setting aside an award the conduct of the arbitral tribunal must be sufficiently serious to offend the basic notions of morality and justice. The Mexican respondents had forfeited their opportunity to be heard by boycotting the tribunal. Ms. Justice Lax stated that the Courts extend a high degree of deference to the decisions made by arbitral tribunals acting pursuant to the Model Law.

**Example 3:**

In *Iran Aircraft IND v. Avco. Corp.*\(^{29}\) the US Court of Appeal denied enforcement of an award on the basis that a US corporation had been unable to present its case in circumstances where the tribunal had disallowed claims of a claimant at the Iran-United States Claims Tribunal because the claims had been documented by a summary prepared by accountants rather than by the actual supporting invoices. At an earlier stage in the proceedings a different chairman of the tribunal, who had since resigned, had indicated to the claimant that it was not necessary to produce the vast quantities of invoices and thereafter it was agreed that the firm of accountants would verify the accounts and summarise the records.

---

\(^{29}\) 980 F 2d 141 (2dCir.1992). Also reported in (1993) XVIII Yearbook Commercial Arbitration, 599.
The Court held that by "misleading" the claimant, however unwittingly, the tribunal denied [the claimant] the opportunity to present its claim in a meaningful manner.

Example 4:

In *Minmetals Germany v. Ferco Steel* 30 an English Court rejected a defence to an enforcement of an award rendered in China where the respondent alleged that the award was based on evidence that the tribunal had obtained through its own investigations. The English Court held that the respondent had been given an opportunity to ask for the disclosure of evidence and to comment on it but had declined that opportunity. During the course of the Judgment, Mr. Justice Colman stated:

"The inability to present a case to arbitrators within section 103(2)(c) [of the 1996 Arbitration Act] contemplates at least that the enforee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice."

This decision was followed by the Court of Appeal in the case of *Kanoria v. Guinness* 31 where the Court refused to enforce an award against a party against whom an award had been made on a basis which had not been notified to him and at a hearing at which he was unable to attend because of ill health.

Article 6(1) of the European Convention of Human Rights may also provide some assistance in determining what is a fair hearing. That provision is as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

---

31 [2006] EWCA Civ 222
Clearly in entering into an agreement to arbitrate a party is forsaking any entitlement to a public hearing. However, as stated in "Procedural Law on International Arbitration" (Georgios Petrochilos para. 451):

"... it cannot be seriously suggested that an agreement to arbitrate is not only a waiver of the right to a court but, further, a blanket waiver of all the guarantees of “fair hearing” in Article 6."

3. **Article 34(2)(a)(iii) - Issues of Jurisdiction:**

   (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;”

This ground arises where there is a partial challenge to jurisdiction. In other words a claim that the tribunal did have jurisdiction to deal with a dispute but that it exceeded its powers by dealing with matters which had not been within the terms of the submission to arbitration.

An example of the application of this ground can be seen in the French case of *Paris Lapeyre and Others v. Sauvage.*[^32] The Cours d’Appel de Paris found that a tribunal which awarded payment of more damages than had been sought had fallen foul of this ground.

A challenge under this ground was rejected by the United States Court of Appeal for the District of Columbia in the case of *Libyan American Oil Company (LIAMCO) v. Socialist Peoples Libyan Arab Yamahirya*[^33] where it had been argued that the arbitral tribunal had awarded a considerable sum of damages for consequential loss when the contract between the parties had excluded that as a head of damage. The US Court

held that “the standard of review of an arbitration award by an American Court is extremely narrow” and the New York Convention did not sanction "second-guessing the arbitrator's construction of the parties’ agreement” and that it would not be proper for the Court to "usurp the arbitrator’s role”.

4. Article 34(2)(a)(iv) – Composition of tribunal or procedure not in accordance with arbitration agreement or the relevant law:

"(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; "

The fourth ground may arise were, for instance, the arbitration agreement provides detail in relation to the qualification of the arbitrator and the arbitrator appointed does not meet this qualification. Alternatively, the procedure adopted at the arbitration may not be in conformity with the procedure mentioned in the arbitration clause. Of course, in many instances, the arbitration agreement does not contain any detail in relation to qualification of the arbitrator or, indeed, in relation to the procedure to be adopted at the tribunal.

An example of the application of this ground can be seen in the case of China Nanhi Oil Joint Services Corporation v. Gee Tai Holdings Co. Limited. 34 This was a case decided by the Supreme Court of Hong Kong. The respondent in that case had attempted to avoid enforcement of an award rendered in China on the grounds that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. The arbitration agreement had provided that the arbitrator should be on the Beijing list. The arbitrators appointed were not on this list but instead were on the Shenzhen list or arbitrators. Mr. Justice Kaplan found, as he stated "somewhat reluctantly", that technically the ground specified had been made out. However, the Judge also pointed out that even where a ground had been established there was still a residual discretion

left in the enforcing Court to enforce nonetheless. Accordingly, in exercise of that discretion the award was enforced.

**The Model Law v. The Old Regime**

How do these grounds relate to the established grounds under the old regime?

1. There is no equivalent to error of law on the face of the record.

2. Misconduct in most cases would be covered by the lack of due process ground.

3. A mistake which the arbitrator requires rectified is not a ground for setting aside. However, there is provision made for this eventuality in Article 33 which is entitled "Correction and interpretation of award: additional award". This Article sets out a procedure whereby within 30 days of the receipt of the award a party may request the arbitral tribunal to correct any "errors in computation, any clerical or typographical errors or any errors of similar nature". Furthermore, if agreed by the parties, a party may request the arbitral tribunal to give an interpretation of a specific point or part of the award. The arbitral tribunal is then given a period of 30 days to make the correction or give the interpretation if it feels the request is justified.

The arbitral tribunal may also correct any error of the type described on its own initiative within 30 days of the award. Another very helpful provision is Article 33(3) which allows the parties to request the tribunal to make an additional award as to claims presented in the arbitral tribunal but omitted from the award. If the arbitral tribunal regards that request as justified, it shall make the award within 60 days. The tribunal is permitted to extend the period within which it is to make the additional award.

4. There is no equivalent in the Model Law to the remission of an award to hear material evidence which could not with reasonable diligence have been discovered before the award was made.
Recent Supreme Court Decisions under the old regime:

In *Galway City Council v. Samuel Kingston Construction Limited and Geoffrey F. Hawker* (unreported) 25th March 2010, the Supreme Court set aside the Award of an Arbitrator on the grounds of misconduct under Section 38 of the Arbitration Act 1954. The Court also removed the Arbitrator under Section 37 of the 1954 Act on the same grounds.

The Arbitration involved a dispute arising out of the redevelopment of Galway’s famous Eyre Square. Galway City Council had entered into a contract in April 2004 with Samuel Kingston Construction Limited to carry out certain works. The work had already commenced in February 2004 and was due to be completed in August 2005. Delays occurred and it appeared that the work would not be completed by Christmas 2005.

On the 27th June 2005 the Contractor ceased work on the site and returned the site keys to the engineer. On the same day the Council’s engineer issued a certificate under Clause 63 of the IEI Conditions which allowed entry onto the site and expulsion of the Contractor in certain circumstances such as bankruptcy or abandonment.

The parties referred the dispute to arbitration and the second-named Defendant was appointed by the Institute of Engineers in Ireland (the ‘IEI’) on the 9th July 2006. The hearing of the Arbitration took place over eight days in early July 2007 with an Award being published on the 8th October 2007. The parties then engaged in a process under Rule 21 of the IEI Procedures where they sought to correct what they contended were errors in the Award. On the 8th December 2007 the Arbitrator published an Amended Award accompanied by an extensive "note of explanation" expressed to be for the assistance of the parties but not to form part of the Award. Essentially the Arbitrator had held that the Council had acted unreasonably in entering onto the site and expelling the Contractor.

The Council then brought proceedings in the High Court to set aside the Arbitrator’s Award. It contended that there were ten defects in the Award amounting to misconduct or
constituting errors of law on the face of the record. The Council further contended that the matter should not be remitted to the second-named Defendant but that a new arbitrator should be appointed.

The High Court (McMahon J.) dismissed the application to set aside the Award. That Judgment was appealed.

Mr. Justice Donal O’Donnell (with whom Geoghegan, J. and Fennelly, J. concurred) upheld the Appeal. The central finding was one of misconduct on the part of the arbitrator in making a finding without hearing one of the parties’ witnesses.

Galway County Council had alleged that the Arbitrator had decided the issue of delay in the case without hearing the evidence of its expert programmer. In preparation for the arbitration hearing, the Council had retained the services of an expert witness who had prepared an eighty page report on the delays. There were rows at the hearing regarding the admissibility of the evidence and whether the issues referred to in the report had been pleaded. In his initial Award, the Arbitrator made no reference to this expert’s evidence (or to some exchanges at the hearing regarding that evidence), notwithstanding the fact that he had proceeded to make a finding on the issue of delay. Under the review procedure, the Council submitted to the Arbitrator that he had been wrong to reach conclusions on the matter of delay without giving the Respondent the opportunity to present the evidence of the expert. The Arbitrator refused to delete the section of his Award dealing with delay. In his note of explanation he made a distinction between the expert and the number of witnesses as to fact who had first-hand knowledge of what had happened. Galway County Council alleged that there could be no basis for excluding their witness’ evidence on the grounds that he was an expert as opposed to a witness as to fact.

In the High Court, Mr. Justice McMahon observed that the explanation given by the Arbitrator was "misconceived and even erroneous". Nonetheless, he pointed out that arbitrators had considerable latitude in determining issues of admissibility and were not bound by strict rules of evidence. On that basis – and also on the grounds that the Council seemed to be going
back on the approach they had taken at the arbitration which had appeared to leave the issue to the Arbitrator – he held that although the Arbitrator was in error it was not an error which was "so fundamental“ so as to justify setting aside the Award.

The Supreme Court disagreed with this approach. According to O’ Donnell, J. this was an issue of misconduct. He stated: -

"A normal and fundamental component of a fair hearing, is that one party is given the same opportunity and facility to make his or her case, as their opponent has been afforded. Classic examples of misconduct leading to the setting aside of an award are where one party is excluded from the hearing, or is prevented from calling a witness, or is limited to written evidence, when the other side are permitted to call oral evidence. The understandable sense of injustice a party will feel in such circumstances can only be compounded if the reasons given for the exclusion of evidence the party wished to call, are plainly erroneous.

Nor do I think that this approach can be excused on the grounds that arbitrators have greater latitude relating to the rules of evidence. The law of evidence is often stigmatised as being unduly constrained by nineteenth century precedent, but at its heart are issues of fundamental fairness, the teachings of experience, and the application of matters of basic logic. The exclusion of evidence on the ground of whether it is not relevant (which was the fundamental objection raised to Mr. Johnson’s evidence) is not some piece of Victorian arcana which an arbitrator would be well justified in ignoring, but is rather an exercise in simple logic: evidence is relevant to an issue when if accepted it would tend to prove or disprove it. If the Arbitrator was going to make a finding on an issue of delay, then Mr. Johnson’s evidence was clearly relevant to that issue. Accordingly, I cannot excuse the Arbitrator’s conduct on this basis."

The finding of misconduct on this ground by Mr. Justice O’Donnell was sufficient to resolve the proceedings. Nonetheless, he went on to examine the other grounds relied on in the Appeal by Galway County Council and found three errors of law on the face of the award which would have justified remittal of the award to the arbitrator.

Furthermore he also acceded to the Claimant’s application to remove the arbitrator (under Section 38 of the 1954 Act) – although on the grounds of the misconduct that he had earlier found and not on the two grounds which had been relied on by the Claimant.
Galway County Council had alleged, firstly, that the Arbitrator was asleep during the Arbitration and, secondly, that he had made inappropriate ex parte contact with the Respondent following the commencement of Court proceedings by Galway County Council.

In this area of the Judgment there are some interesting comments on the importance of parties raising objections at the hearing. He said:-

"If this type of challenge is to be made, then I think it is necessary to have addressed the matter with the Arbitrator and made serious efforts to make sure the arbitrator can be completed to the satisfaction of all parties"

This fits in well with Article 4 of the Model Law on Waiver of the right to object.

There are some interesting observations in the decision regarding the 'falling asleep' ground. Mr. Justice O'Donnell stated: -

"I must say that the assertion that an award should be set aside – or even that the Arbitrator should be removed from future conduct of the arbitration – on grounds that at some stage he or she had fallen asleep, is one which should I think be viewed with some distaste. Taking the extreme situation of an award which is otherwise unimpeachable, a claim that the award should nevertheless be set aside on the grounds of an allegation that the Arbitrator was momentarily but undeniably asleep, is one which manages to combine the maximum of harm with the minimum of merit. In such a hypothetical situation the claim would be without much merit, because most fair minded people will know a momentary drowsiness is something that can occur. It is also an allegation however which is in some respects unfair, since human experience also shows that being awake is no guarantee that the listener is alert. The eyes may be open, but the mind may be far away or even closed. The primary test of the adequacy of performance of a decision maker’s function, should normally be the quality of the decision itself.

.........

None of this however means the fact that an arbitrator, decision maker or judge falls asleep repeatedly is not a serious issue, and one which should be carefully scrutinised, and which in an appropriate case, should lead to the immediate removal of the decision maker and the quashing of the decision. This is not so
much because it necessarily demonstrates any lack of capacity in the decision
maker, but rather because it is corrosive of the confidence which is the
minimum which parties are entitled to expect from the system of decision
making. ....”

O'Donnell, J. however, went on to criticise the parties in this case for the unsatisfactory way
in which they dealt with the matter. It should have been dealt with at the time "if possible in
a discrete and tactful way”. He stated: -

“There may have been reasons for this, including the simple human unwillingness
to confront an embarrassing issue, and perhaps a less elevated concern that to
raise the issue would antagonise an arbitrator while he or she was still deciding the
case. But in my view, if the matter had reached a sufficiently important level that it
required to be addressed by the parties, then it is normally desirable if not indeed
essential to address the matter with the Arbitrator. Indeed to do so may have a
number of forensic benefits in that at a human level it is to be expected that a
conscientious decision maker will normally be apologetic and eager to ensure that
the matter will be remedied and will be alert to avoid repetition. That would be the
most effective remedy for both parties. At a most basic and self interested level the
raising of the matter would also strengthen the hand of any party who
subsequently sought to rely on it. For example if the decision maker was to deny
an incident which could be proved to have occurred, or if having been alerted to
the problem, there were further serious recurrences, an application for removal
would be strengthened. By contrast, if the parties decide to muddle on in the
hearing through a mixture of diffidence and a desire to avoid disruption and cost,
they must expect that they will be bound by that choice and will not be entitled to
revive the complaint about the conduct of the arbitrator when they discover that
the decision is adverse.”

The analysis contained in Mr. Justice O'Donnell’s decision is obviously rooted in jurisprudence
on the Arbitration Acts 1954 to 1998. It examines whether there is evidence of either an
error of law on the face of the record or misconduct sufficient to justify the setting aside or
remittal of the award.

Those concepts of error of law on the face of the record and misconduct do not exist under
the regime introduced by the new Act. Instead, it is necessary to bring an application to set
aside an award (under Article 34) or an attempt to resist the enforcement of an award
(Article 36).
However, it seems to me that the misconduct found by Mr. Justice O’Donnell in the Eyre Square case in failing to hear the evidence of Galway County Council’s expert falls squarely within the lack of due process ground in Article 34(2)(a)(ii). A similar point could be made about the objections to the arbitrator falling asleep or having inappropriate ex parte contact with one of the parties.

Such matters would also appear to offend against Article 18 of the Model Law which requires equal treatment of the parties. Article 18 states: -

"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

The comments made by Mr. Justice O’Donnell about the importance of the parties raising issues at the hearing are also significant. Article 4 (waiver of right to object) of the Model Law may have some relevance in this regard. In provides: -

"A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object."

**Campus and Stadium Ireland Development Limited v. Dublin Waterworld Limited** (unreported), 30th April 2010, is another recent decision of the Supreme Court in which an arbitral award was set aside.

Judgment in this case was delivered by Mr. Justice Hardiman with whom Denham, J. and Geoghegan, J. concurred. In this case the basis of the setting aside was an error of law on the face of the award.

The arbitration concerned the National Aquatic Centre in Dublin which had been built by the Claimant (CSI) at a cost in excess of €62m, exclusive of VAT. On the 30th April 2003 it let the property by way of lease to the Respondent (DWW).
An issue arose as between the parties as to whether VAT was payable on the creation of this interest in the premises and, if so, in what amount. CSI took proceedings against DWW claiming the sum of €10,254,600 relating to the VAT on the lease. Those proceedings were stayed on the 3rd June 2005. On the 5th July 2005 the Arbitrator made an Award finding that the sum sought by the Claimant by way of VAT had been correctly charged. The Claimant subsequently took proceedings to enforce the Award. The Respondent sought to resist the enforcement on the grounds of an error of law on the face of the record.

The case before the Arbitrator turned on consideration of the valuation of the lease. It was accepted by both parties that if the capitalised value of the lease was less than the economic value of the lease, the lease would be exempt from VAT. As a consequence CSI would not be entitled to recover the VAT it had incurred on the cost of developing the property.

Under Section 10, subsection 9 of the VAT Act 1972 the value of the lease, being an interest in immovable goods "shall be the open market price of such interest". The "open market price" is defined in the subsection as the price which "the right to receive an unencumbered rent in respect of those goods for the period of the interest would fetch on the open market at the time that that interest is disposed of". Under the Act, the Revenue is entitled to make regulations to give effect to the Act in relation to the valuation of interest in or over immovable goods. Hence the Revenue had made VAT Regulations of 1979 (SI No. 63 of 1979).

CSI had obtained a professional valuation from a valuer in the Valuation Office which had confirmed an open market price of €35,054,725. This was less than the economic value and, accordingly, no VAT would be due under the lease. In order to avoid this, CSI used a different formula set out in Regulation 19 which made DWW liable for the VAT.

DWW’s complaint against the Arbitrator was twofold. Firstly, they pointed to his finding that the opinion of the valuation office valuing the interest being disposed of at €35m. was not evidence of the open market price and that it was simply an estimate. It was a condition
precedent to the use of one of the other formula (which favoured the Claimant) that there should be an absence of other evidence of the open market value. The second ground of objection was the finding, *inter alia*, by the Arbitrator that the VAT system could not function effectively if a supplier’s VAT charge was subject to review by his customer.

This Respondent’s defence to the enforcement proceedings was unsuccessful in the High Court. As regards the second of these points Mr. Justice Gilligan stated that although this was an error it could not be regarded as a “*fundamental error of law on the face of the award or of having any significant impact on the decision of the arbitrator*”.

The Supreme Court disagreed. Hardiman, J. stated: -

“If, in the Arbitrator’s view the customer (here DWW) could not review CSI’s VAT charge, so that any evidence which it might adduce on that question was simply irrelevant, then it is hard to see what the Arbitrator was doing in arbitrating between the parties. It is hard to see why he dismissed Mr. Cahill’s opinion as not constituting evidence at all if the true position was (as they seem to think) that it was simply entirely irrelevant.”

In Hardiman, J’s view the Arbitrator had made a serious misstatement of the law appearing on the face of the Award. The Arbitrator had erred in finding that the valuation report was not evidence but merely an estimate. That finding allowed the Arbitrator to adopt the view that there was an absence of other evidence of price, thereby allowing the CSI to use one of the formulas that suited them in Article 19 of the Regulations.

In these circumstances, Mr. Justice Hardiman overturned the decision of Gilligan, J. and set aside the Award of the Arbitrator.

It is unlikely that there would have been a similar outcome under the new law.
CONCLUSION:

A reasonably substantial body of case law has built up over many years in relation to the old regime on arbitration. To a large extent we must now start with a clean slate. Precedents under the old regime will have to be treated with a considerable amount of caution. The new regime opens up a whole body of international case law on the Model Law. Not only will the Irish Courts now have that case law at their disposal, but there will be a real opportunity for the High Court to stamp its mark on the international jurisprudence thereby enhancing the already high reputation of the Irish Courts.

The new law should ensure that the environment for arbitration in the country will meet the needs of users and conform to international best practice. Two additional features should also greatly assist. Almost all arbitration related applications will go to either the President of the High Court or to a specific Judge designated for arbitration matters. This should ensure greater consistency and predictability of outcome in Court applications. Furthermore, there will be no appeal to the Supreme Court from the key arbitration applications, thereby guaranteeing both speed and certainty.
THE ARBITRATION ACT 2010

CHALLENGE AND POTENTIAL

Ciaran Fahy
Chartered Engineer, Chartered arbitrator

Arbitration Centre
Distillery Building
Church Street
Dublin 7

12 June 2010
The introduction of the Arbitration Act 2010 is a truly significant event in the area of Dispute Resolution in this country. It is the first fundamental change to Irish Arbitration Law in almost sixty years and the fact that the previous significant change before that occurred in 1699 (10 William III, c14) puts the event in some context.

The new Act did not come about overnight. Pressure for change came to a head in 2007 involving discussions between a number of parties and institutions and this in turn resulted in a seminar in April 2007 where the major shortcomings in the 1954 Act were identified and modifications suggested. That seminar was instigated by the CIArb and chaired by the Attorney General, Rory Brady, and the main catalyst for change was a desire to bring our Arbitration practice into line with best international practice and update our existing Act. The main shortcomings identified at that seminar were the need to:

- Provide for Reasoned Awards.
- To allow an Arbitrator to decide on jurisdiction.
- To allow an Arbitrator to dismiss or terminate on grounds of undue delay.
- To allow an Arbitrator correct/amend/interpret an Award.

The Bill itself was published in 2008 and then followed extensive discussion including a number of seminars the most of significant of which occurred in January 2009 involving all of the institutions/organisations active in the area and at which a number of the speakers today including the Chairman contributed. The proceedings of that seminar were published and I am happy to say that many of the suggestions or recommendations arising from this seminar have been incorporated into the Act which we have today.

The concerns raised at the April 2007 seminar and described above have all been dealt with in the new Act and in addition the power of the arbitrator has been extended significantly. Specifically:
• Reasoned Awards. The default position as set out in Art 31 is that reasons must be provided unless the parties agree otherwise.

• Jurisdiction. Art 16 provides that the arbitrator may rule on jurisdiction subject to an appeal to the High Court within 30 days.

• Undue Delay. Art 25 provides that an arbitrator shall terminate the proceedings where a Claimant fails to provide a Statement of Claim “without showing sufficient cause.”

• Correction/Interpretation. Art 33 allows an arbitrator to correct/interpret an Award and also to deal with any claims omitted by means of an additional award.

Consequently I believe the Act which has been brought into law has responded to practitioners needs and is one in which we can take a certain satisfaction. As I see it is at the forefront of international practice and it should provide not only a stimulus for domestic Arbitration within this country but also act as a basis for the development of this country, and in particular Dublin, as a Centre for International Arbitration. In that regard I particularly welcome the formation of Arbitration Ireland as a body to promote that objective which as I see it is very much in the national interest.

While the new Act offers considerable scope I believe it is faced with some challenges and it is this aspect which I wish to deal with this morning. In particular I wish to touch on a particular challenge which is arising on the domestic front namely a move towards Adjudication in Construction Contracts and I wish to consider how Arbitration as a process might respond.

In broad terms the challenge faced by Arbitration is that it is increasingly perceived as lengthy and expensive. In other words while it is seen as a fair and effective means of resolving disputes it is not seen as an expeditious or economic way of doing so. Such comments arise not only within this country but are increasingly heard at meetings and seminars internationally.
Within this country there is now a serious proposal to introduce UK style Adjudication into Construction Contracts as a result of the Private Members Bill, the Construction Contracts Bill 2010, introduced into the Seanad by Senator Fergal Quinn. The second stage of this was taken on 19 May 2010 and in the main it was enthusiastically received by eighteen members of the House who spoke in its favour. The government has since given a commitment that the Bill will be taken up again on 19 October next and it has initiated a consultation process with various parties within the Construction Industry.

The Construction Contracts Bill 2010 has been introduced to tackle a problem which has arisen in relation to construction work whereby contractors and subcontractors frequently find they are either not paid at all, or paid very late or alternatively receive only a portion of what they are entitled to. The Bill introduces a number of measures to deal with this such as the right to suspend work for non payment and also the requirement of the paying party to provide a notice if it is withholding payment together with the reasons for doing so.

The Bill also proposes the introduction of UK style Adjudication for all disputes arising from Construction Contracts. Statutory Adjudication was introduced into the UK by Part 2 of the Housing Grants, Construction and Regeneration Act 1996 as a response to the Latham Report of the early 1990s known as *Constructing the Team* and which identified cash flow as a major problem within the Construction Industry. Adjudication came into effect in the UK generally in May 1998 and was extended into Northern Ireland in June 1999.

Statutory Adjudication as in the UK or indeed in Section 8 of Fergal Quinn’s Bill provides that any Construction Contract must:
Allow a party to serve notice to refer a dispute to Adjudication at any time.

Provide for the appointment of an Adjudicator within seven days of such a notice.

Require a decision within twenty eights of referral of the dispute to the Adjudicator with the proviso that the parties may agree to extend this time.

Allow the Adjudicator to extend the period of twenty eight days by up to fourteen days with the consent of the referring party.

Require the Adjudicator act impartially but at the same time allow the Adjudicator to take the initiative in ascertaining the facts and the law.

Any such Adjudicator’s decision is binding pending final determination whether by agreement of the parties or alternatively by Arbitration or litigation. The parties bear their own costs of the procedure and normally share the Adjudicator’s costs and expenses although the Adjudicator has discretion as regards the allocation of these.

The significance of Adjudication as set out above is that it shifts the balance between the referring and the responding party and it does so within a very tight time frame. In the case of a decision on a monetary award the decision is temporarily binding and enforceable against the paying party and while the matter may subsequently be pursued in Arbitration or in court this can only be done after the money has been handed over. As a consequence of this it is generally accepted that most such disputes are resolved by Adjudication so that consequently there has been a marked decline in the use of Arbitration as a Dispute Resolution process for construction disputes in the UK.
It is generally accepted that such Adjudication represents rough justice but its supporters would argue forcibly that it is expeditious, economic and generally effective. Its use has spread within the UK and the 1996 Act is currently being updated and amended following a review of the existing Act chaired by Sir Michael Latham in 2004. Adjudication has also been adopted in Australia and New Zealand as well as some Far Eastern countries. In this country Adjudication is being championed by the Construction Industry Federation and the CIF are proposing that Adjudication be introduced into this country along the lines of the updated UK Act in order to take advantage of the significant case law which has built up since 1998.

This then represents the most obvious and immediate challenge to Arbitration as a process. The question that arises is whether Arbitration has any benefit or answers to offer in this area. Quite clearly in a dispute where a subcontractor claims he is owed €200,000 by a main contractor he will see little benefit in pursuing an Arbitration where it might take him two years to get an award as against a time constrained Adjudication where he could realistically hope to get a decision within forty two days.

However I believe that Arbitration under the new Act does offer a possible solution to the type of dispute which I have outlined above but as I see it, it can only do so on the basis of a short or fast track procedure which the parties in dispute have committed themselves to.

Engineers Ireland produced an Arbitration Procedure in 1987 and this was subsequently updated in 2000. Although obviously written for use with the IEI Conditions of Contract for Civil Engineering Work the Arbitration Procedure 2000 has been widely used in the Construction Industry generally. The Procedure was written in the context of the 1954 to 1998 Acts but it sought to overcome the limitations imposed by those Acts by extending the Arbitrator’s powers for example to rule on jurisdiction, to order security for
costs and also to make an award dismissing the claim in a situation of “inordinate and inexcusable delay by either party in pursuing its claim.” The EI Arbitration Procedure provides for a short procedure but this is contained within the document and as a consequence, to the best of my knowledge, has been rarely used because of the reluctance of at least one of the parties to adopt it once embarked on the dispute.

At Engineers Ireland we are currently engaged in redrafting our Arbitration Procedure in the light of the new 2010 Act. As part of this approach we have decided that any such procedure and indeed all of our procedures will be made freely available on our website and in the case of the Arbitration Procedure we have decided to provide two separate documents one a general Arbitration Procedure while the second will be a Short or Time Constrained Procedure. The intention in doing is obviously to provide for a choice at the time the contract is entered into.

We are very close to a first draft of the two procedures and our current thinking is that the Short Procedure should be such as to produce an award on the merits within one hundred days of the appointment of the Arbitrator. I see no reason why this should not be a realistic prospect for a relatively straightforward dispute similar to that which I have referred to previously.

Since the 1990s the process used for the resolution of construction disputes in this country has been Conciliation and Arbitration operating sequentially. In the case of the New Public Sector Contracts the form of Conciliation, as set out in Clause 13 of the Contract, is in fact a form of Adjudication since the Conciliator’s recommendation is binding in the interim and where a payment is recommended this must be made, subject to the party which is to receive the money putting up a bond. If the current proposal to introduce Adjudication is successful it seems to me the landscape will change so that we will have Adjudication followed by Arbitration with precious little of the
latter on the basis that if the Adjudicator gets it half right there will be little left to fight over.

I can see significant arguments for the introduction of Adjudication into this country but I believe that before embarking on such a course, which is likely to have a significant impact on the Construction Industry over decades, that the matter should be thought through carefully and in consultation with all of the relevant parties. I have tried to point out today that fast track Arbitration based on the new Act does offer an alternative and I believe it should be considered.

Such an arbitration process would not operate within quite as tight a time frame as Adjudication but I still believe it would be acceptable in that the process, or the threat of it, would resolve the cash flow difficulties complained of while at the same time offering a fairer procedure generally. I also think that fast track Arbitration would sit better with a facilitative procedure, such as Mediation in particular, which could be carried out concurrently at some point during the Arbitration particularly once the issues in question had been crystallised.
Proposed changes to the Rules of the Superior Courts
Emily Gibson BL

12 June 2010

Overview
• Role of the courts under new Act

• Proposed changes to Court rules

• Suggested amendments to rules
  1. Role of Courts – Past
  • Supportive of arbitration – increased recognition of the role of ADR

  • 1954 and 1998 Acts – case law limited

  • Legislation – afforded opportunity to oversee and intervene in process at request of parties or arbitrator

  • 2010 Act – reduced scope for court intervention
    1. Role of Courts – Changes 2010
    • High Court dealing with interim relief or taking of evidence
    – no jurisdiction to make any order re. security for costs or any order for discovery, unless parties agree

    • No appeal to Supreme Court re. stays, setting aside of awards or recognition & enforcement of awards.

    • Case stated procedure abolished

  1. Role of Court – Changes 2010
  • Only way an award can be set aside or remitted to arbitrator is if satisfies specific narrow provisions of Article 34 of the Model Law

• Power to adjourn proceedings
  – Circuit Court/High Court may at any time during the trial of proceedings adjourn the proceedings if it thinks appropriate to do so & with consent of the parties
  – So parties might consider whether all or any of the proceedings might be referred to arbitration (S.32)

• Changes to Court Rules
• Rules under review by Superior Courts Rules Committee
• Amendments to Order 11 (Service out of the Jurisdiction) and Order 56 (Arbitration)

• Title: Rules of the Superior Courts (Alternative Dispute Resolution) 2010

Order 56 – Part I
I - Power to adjourn proceedings to facilitate ADR
• Under S. 32 or
• When Court considers it appropriate & having regard to all circumstances – adjourn proceedings &
• Invite parties to use ADR process (other than arbitration) to settle or determine the proceedings or issue or
• Invite parties to attend such information session on the use of mediation as the court may specify

Order 56 – Part I
• Application – made on notice, grounded on affidavit

• Order shall not be made later than 28 days before the date on which proceedings first listed for hearing – save for special reasons given by court

Order 56 – Part II
II Applications to the Court re. arbitration
– Rules – applications by parties to an arbitration or an intended arbitration
– Title: “In the matter of the Arbitration [insert name] and in the matter of the Arbitration Acty 2010”
– Applications on notice
• Respondent - certain cases – arbitral tribunal (not as a party)
• No time limit given for hearing of motion – possibly open to abuse

Applications on Notice
• Following applications - originating notice of motion
– Applications under Articles 11 (3), 11 (4), 13 (3), 14, 16 (3) and 34 (2) of the Model Law relating to matters such as the procedure for challenging an arbitrator and for setting aside an arbitral award

Applications on Notice
• Applications under Article 9 (granting of interim measures of protection), Articles 17H (recognition and enforcement of interim measures issued by arbitral tribunal), 17I (grounds for refusing recognition and enforcement of interim measure), 17 J (court ordered interim measures), Article 27 (court assistance in taking evidence), Article 35 (recognition and enforcement of arbitral awards) - subject to Article 36 (grounds for refusing recognition and enforcement).

Ex parte Applications
• Applications relating to interim measures – Article 9 and Article 17 J can be made ex parte
• Made subject to terms as to costs “as the court may think just”
• Affected party – can bring motion to vary/set aside within 28 days
Other Applications
• Request for stay under Article 8 (1) or Art II 3 NY Convention – made by motion in proceedings
• Relief – interpleader granted – application to direct issue between claimants to be determined by arbitration – made at hearing of application/proceedings in which relief granted
• Application re. bankruptcy proceedings in accordance with Order 76
• Taking of Evidence under Article 27 – ex parte
  Judge hearing application
• Every notice of motion pursuant to this Order shall be returnable before and shall be heard and determined by the President of the High Court or a Judge of the High Court for the time being nominated by the President to perform the functions of the High Court referred to in section 9 (2) of the Act.
  Single Arbitration Judge – consistency
  Affidavit evidence
• Application may be made in _summary manner (S. 9 (3))_
• Except where the court otherwise directs – applications heard and determined on Affidavit
• Time limits – exchange of affidavits

Role of Commercial Court
  “Subject, in the case of any proceedings which have been entered in the Commercial List, to the provisions of Order 63 A and of any order made or direction given by the Court under that Order, the procedure specified in this rule shall apply to proceedings by originating notice of motion in accordance with this Order.”

Role of Commercial Court
• Proposed Amendment of Order 63 A Rule 1
  “Commercial proceedings”
  “(c) any application or proceedings under the Arbitration Act 2010 (other than an application or request for an order under Article 8(1) of the model Law or Article II 3 of the New York Convention (each within the meaning of section 2 (1) of that Act )) where the value of the claim or any counterclaim is not less than €1,000,000;”

3. Suggested Amendments
• Confine rules to arbitration – extension to ADR confusing (mediation, conciliation defined) more appropriate in an Order similar to Order 19 A
  Circuit Court Rules – case progression
• Reconsider role of the commercial court – arbitration judge only- in line with wording of S. 9
• Ensure consistency with the language of the Model Law and the Act – important to provide internationally minded rules for safe interpretation.
The interaction of article 8 and article 16 - farewell to section 5 stay applications

One of the corner stones of arbitral theory and practice is that national courts will not allow parties who have bargained for arbitration to circumvent that agreement and pursue litigation. Since 1958 this has been enshrined as an international obligation in Article II of the New York Convention with the national courts of contracting states required to stay litigation when the substance of the case is captured by an arbitration agreement.

Ironically at the same time as Ireland brought the provisions of the New York Convention into domestic law in 1980 the Arbitration Act of that year introduced an exception to stay applications, namely that by a plaintiff showing that there was not in fact any dispute between the parties, the Court could decline to refer the matter to arbitration. This led to a minor industry with rolling affidavits about whether or not a stateable defence was made out or not. Theories of what was or was not a dispute ranged from a very strict approach (a simple refusal to pay constituting a “dispute”) to a wide-ranging examination of the merits of the case.

With the Arbitration Act 2010 we wave goodbye to the section 5 stay application and greet Article 8 in its place:

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of
the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Note the salient features:

- the subject of an arbitration agreement, not the dispute, is the critical issue. A wide interpretation should be given to “subject of an arbitration agreement” consistent with prevailing international case law, most recently in England. *Fiona Trust and Holding Corporation and others v. Privalov and Others* [2007] 4 All ER 951 where Lord Hoffman critiqued the authorities dealing with the distinction between arbitration clauses referring to dispute arising “under” as opposed to “out of” the contract:

  In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction. As Longmore LJ remarked, at para 17: “if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.”
- mandatory stay except "null and void, inoperative or incapable of being performed" - language taken directly from the New York Convention

Principal consequence of the new Act - no examination whatsoever of the presence of a "dispute". Even if the defendant says "I have no defence but I invoke my bargain for arbitration" the court must stay the litigation. There is no room for the "surely we don't have to go off to arbitration".

What is meant by the three exceptions:

- null and void
- inoperative
- incapable of being performed

Before answering that question, one needs to read Article 16 in order to fully understand the overall system devised by the Model Law.

**Article 16. Competence of arbitral tribunal to rule on its jurisdiction**

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the
appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

This is the doctrine of kompetenz kompetenz - without this doctrine arbitration becomes unwieldy. Article 16 gives statutory force to the doctrine whereby an arbitrator has jurisdiction to determine whether or not he/she has jurisdiction over the dispute. This power is subdivided into two:

- The power to determine whether the parties bargained for arbitration in the first place (e.g. a claimant brings an arbitration against a party which is not an express signatory to the agreement; the claimant says that the respondent did, for a variety of reasons, manifest its consent to arbitration; the respondent says “this claimant is a stranger to me and I did not bargain for arbitration”; the arbitrator can determine this issue – namely whether there is a valid arbitration agreement in existence between the parties)
- The power to determine whether a claim is within the ambit of the arbitration agreement (e.g. a respondent says that the claimant’s claim is, even with the widest interpretation of “all disputes arising out of this agreement shall be resolved by arbitration”, not captured by the arbitration agreement; or, there is some mandatory provision of law which precludes arbitration of a certain type of dispute)

This doctrine obviates the need for parties to go to court to determine the validity or scope of arbitration agreements, and gives the arbitrator the first bite at jurisdiction. That is not the final word on jurisdiction, and I shall return to that later.

A further feature of Article 16 to bear in mind in this context is:

For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

In short, a contract which contains an arbitration clause is in fact not the same as the arbitration agreement. Why so? Very simply, if the arbitration agreement was contained entirely within the main contract then a declaration by an arbitrator, for example, that the main contract was null and void ab initio would also bring to an immediate end the arbitration agreement. This would mean that the award declaring the main contract null and void ab initio would also fall by the wayside and vanish into thin air; plainly an unsatisfactory result. Thus, by maintaining a separate existence, any decisions under the arbitration agreement have a valid life of their own.

Having placed Article 16 in context, one can now return to Article 8.
A plaintiff who has brought litigation and is faced with a stay application under Article 8 cannot, in the light of Article 16, credibly say to the Court that it does not have an adequate remedy before an arbitrator to challenge jurisdiction; whether the argument is that there is no valid arbitration agreement in existence in the first place, or whether the subject-matter of the dispute falls outside the ambit of the arbitration agreement. That is an important safeguard, both for the plaintiff whose litigation is being stayed, and also for the process of arbitration as a whole; were it otherwise, arbitration could easily be derailed.

The three grounds presented by Article 8 to avoid a stay of litigation, null and void, inoperative, or incapable of being performed, do not relate to the main agreement, but only to the separate arbitration agreement. These are exceptionally onerous to demonstrate and cannot be lightly invoked. The possibilities include forgery of the arbitration agreement, or an arbitration agreement which expressly nominates a particular individual to be the arbitrator and that person is dead.

In summary, the landscape of stay applications has changed utterly from the familiar contours of section 5 of the Arbitration Act 1980. Avoiding arbitration agreements by means of litigation, regardless of how determined a plaintiff might be, or how it might have been perceived in the past as a tactical advantage, is firmly consigned to Irish legal history.

There is one final matter to be borne in mind; there is the ultimate safeguard that the arbitrator’s determination of jurisdiction under Article 16 is not the last word on the subject. The High Court has the final say if the party challenging jurisdiction has lost that issue before the arbitrator (Article 16(3), in part):

*If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after*
having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

This is a most important provision as it ensures that an arbitrator does have some element of supervision over the most basic and fundamental building block of arbitration, namely that the parties consented to have their disputes resolved by that method.

A question which will arise for decision by the High Court is the nature of the process it undertakes when asked “to decide the matter”. Is it a de novo rehearing, or is it a more limited review? The answer is one which will be awaited whenever the issue comes before the High Court in due course. I will make some suggestions for consideration.

When the jurisdictional issue concerns whether or not there was an agreement to arbitrate in the first place (e.g. a respondent saying “this claimant is a stranger to me”) then the scrutiny should be closer than a situation where the arbitrator, under the auspices of a valid arbitration agreement, has held that a particular claim is captured by that agreement. In the former instance, the next question is how close should that scrutiny be? There are differing experiences from abroad. In England there is a full rehearing (e.g. Azov Shipping Company v Baltic Shipping Company (os 1-3) [1999] 1. Lloyd's Rep 68). This approach, which chimes with the traditional English approach of a slightly heavier hand of the courts relating to arbitration, has its supporters and opponents. A full rehearing certainly increases the cost and complexity of arbitration, but does give the assurance of a fall back protection by the Courts. However, it can be abused and a recalcitrant party bent upon wreaking havoc can, in effect, start up a parallel process on matters of substance (as often the
bargain to arbitrate is inextricably linked to crucial issues at the time of entering into the main agreement). The Commercial Court Users’ Committee in London has expressed concerns about the approach of the English Courts to full jurisdictional rehearing and the issue may, possibly, come under judicial scrutiny in the UK Supreme Court in the context of a pending appeal (presently listed for 28-30 June 2010) in the case of *Dallah v Government of Pakistan.*

An alternative can be found in Switzerland. The Federal Supreme Court has held that a jurisdictional challenge is divided into two areas, namely law and fact. On law it will freely decide for itself what the legal principles are concerning consent to arbitrate without any constraints. No deference is accorded to the arbitral tribunal’s view of the law on the issue. Thus, one could say that there is a true rehearing before the Federal Supreme Court on the law.

On issues of fact it does not “rehear” the matter, rather it “reviews the factual findings of the award under appeal, even with regard to jurisdictional issues, only to the extent that some admissible grievances within the meaning of art. 190 (2) PILA [the Swiss statutory provisions dealing with grounds to challenge an award which include jurisdiction] are made against such factual findings or exceptionally when new evidence is taken into consideration.” This was recently confirmed by the Federal Supreme Court.

The Swiss approach is, I believe, the preferable option for Ireland. A challenge to a jurisdictional finding by an arbitrator as to the existence of a valid arbitration agreement should set out the relevant legal principles for the formation of agreements, a factual analysis, and then the result. The Court scrutinising that decision should come to its own view as to the relevant legal principles (i.e. it is not constrained in any way by the findings of law of the arbitrator) but pay deference to factual findings, unless of course there is some perverse and unsustainable view of the facts, or indeed a critical fact emerges which could not have been put before the arbitrator. Merely
because the Judge thinks that the facts should be decided differently should not be enough if the evidence could go either way – an expression which might be attractive in this regard is “a tie in favour of arbitration”.

If the challenged jurisdictional decision relates to the scope of the arbitration agreement and whether or not a particular issue or dispute is captured by the clause, then different standards should apply. The US Supreme Court, in one of its most important decisions in this field, held that deference should be shown to an arbitrator’s decision as to whether or not an issue fell within the ambit of the arbitration agreement: First Options of Chicago, Inc. v. Kaplan 514 U.S. 938 (1995).

The path which the High Court will take, if and when these issues comes up for decision, is a matter of conjecture. Perhaps a pointer might be found in section 9(3) of the Arbitration Act 2010 which prescribes the manner of applications to the High Court:

\[
\text{An application may be made in summary manner to the President or to such other judge of the High Court as may be nominated by the President under subsection (2).}
\]

The present draft of the Rules of the Superior Courts dealing with the Arbitration Act 2010 directs that applications are brought on foot of an originating notice of motion grounded upon an affidavit. It seems reasonable to say that the Oireachtas, when The present draft of the Rules of the Superior Courts dealing with the Arbitration Act 2010 directs that applications are brought on foot of an originating notice of motion grounded upon an affidavit. It seems reasonable to say that the Oireachtas, when prescribing a summary manner for applications to the High Court under the Arbitration Act 2010, intended a light touch rather than a heavy hand. Beyond that, and in the absence of case law, one can speculate no further.
The Irish Arbitration Act 2010, or why choose Ireland as the seat for an international arbitration?

Peter J. Turner, Freshfields Bruckhaus Deringer LLP, Paris 12 June 2010

Contents

☐ The wrong reasons

☐ The right reasons

☐ Does Ireland meet these criteria?

☐ The real reasons for choosing Ireland

The wrong reasons

☐ Neutrality of country
☐ Independence from parties and counsel
☐ Equal (in)convenience for all
☐ Chairman’s home city
☐ Presence of arbitral institution
☐ Governing law of contract (but NB mandatory provisions of governing law/lois de police/ordre public)

The right reasons

☐ Signatory state of New York Convention (in case of reciprocity reservation)
☐ A modern arbitration law
☐ Sensible, experienced courts with quick and efficient procedures for implementing the law

including in particular:
☐ stay applications;
☐ measures in support of arbitrations;
☐ setting-aside applications; and
☐ enforcing awards
Any mandatory provisions of law of seat
Setting-aside grounds/definition of public policy
Experienced and knowledgeable legal practitioners in case of application to court
But no restrictions on choice of counsel in arbitration
Good communications

Does Ireland meet these criteria? (1)

Cannot comment on courts or lawyers in Ireland (though both are no doubt excellent)
What about the Arbitration Act?
Adopts the Model Law as amended in 2006 for all arbitrations (s 6)
No overriding principle of efficiency/cost-effectiveness
Possibility of specialist judge to hear all applications under the Act (s 9)
No appeal from High Court for stay and setting-aside applications and recognition and enforcement (s 11)
No power for the court to order security for costs (s 10(2))
No appeal on a point of law, case stated or setting-aside for error of law
No (express) possibility to exclude setting-aside grounds
Enacts NY Convention, Geneva Convention, Geneva Protocol and deals with enforcement under the Washington Convention

Does Ireland meet these criteria? (2)

What about the Model Law?
Principle of limited court interference (Art 5)
Default of three-member tribunal (Art 10(2))
Independence and impartiality of arbitrators (Art 12(1))
Compétence-compétence (Art 16)
Ex parte applications for interim relief to arbitral tribunals (Art 17B Model Law)
Possibility of debate about the parties’ “full opportunity” to present their respective cases (Art 18)
Party autonomy in matters of procedure (Art 19)
Arbitration under the Model Law in the absence of choice of rules by the parties can be a little cumbersome (eg Arts 23-25)
Setting-aside grounds standard (including public policy) (Art 34)
Recognition and enforcement track NY Convention therefore no national exceptions/particularities (Art 36) (NB in particular Art 36(1)(a)(v))

The real reasons for choosing Ireland
The real reasons

☐ Guinness
☐ Georgian Dublin
☐ Guinness
☐ Fine dining
☐ Guinness
☐ Irish hospitality
☐ Guinness
☐ Good hotels with swimming pools
☐ Etc

© Freshfields Bruckhaus Deringer LLP 2010
This material is for general information only and is not intended to provide legal advice.
THE ARBITRATION ACT 2010

THE PRACTICAL AND PROCEDURAL STEPS OF SELECTING AN ARBITRAL TRIBUNAL
Andy Lenny

12 June 2010

1
The Arbitral Tribunal

☐ Article 2 of the Model Law
- “arbitral tribunal” means a sole arbitrator or a panel of arbitrators.
☐ Article 10 of the Model Law
- The parties are free to determine the number of arbitrators.
- Failing such agreement the number of arbitrators shall be three.
☐ Section 13 of the Act
- Unless otherwise agreed by the parties, the Arbitral Tribunal shall consist of one arbitrator only.
☐ Considerations for the composition of the Arbitral Tribunal
- Cost.
- Enhancing expertise.
- Minimisation of risks.

2
The Appointment of the Tribunal

☐ Article 11 of the Model Law
(1) No person shall be precluded by his nationality from acting as an arbitrator unless otherwise agreed by the parties.
(2) The parties are free to agree on a procedure of appointing the Arbitral Tribunal.
(3) Failing such agreement:
(a) In an arbitration with three arbitrators:
- Each party will appoint one arbitrator and the arbitrators appointed will appoint the third arbitrator.
- If a party fails to appoint an arbitrator within 30 days or if the two arbitrators
appointed fail to agree on a third arbitrator within 30 days of their appointment, then the appointment will be made at the request of either party by the High Court. (b) In an arbitration with a sole arbitrator, if the parties are unable to agree an appointment, then the arbitrator will be appointed by the High Court.

3
Tribunal The Appointment of the Tribunal

(4) Where under an appointment procedure agreed upon by the parties:
(a) A party fails to act as required; or
(b) The parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or
(c) A third party, including an institution, fails to perform any function entrusted to it
any party may request the High Court to take necessary measures to overcome those problems (unless the agreement for the appointment procedure provides otherwise).

4
Tribunal The Appointment of the Tribunal

(5) (a) A decision to be made by the High Court as referred to at (3) or (4) shall be subject to no appeal.
(b) The High Court shall have due regard on making an appointment to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.
(c) In the case of a sole (or third) arbitrator, the High Court shall take into account the advisability of appointing an arbitrator of a nationality other than those parties.

5
Grounds for Challenge of Appointment

☐ Article 12 of the Model Law

(1) (a) Where a person is approached in connection with his possible appointment as an
arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

(b) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed to by the parties.

6

Grounds for Challenge of Appointment

☐ Article 13 of the Model Law

(1) The parties are free to agree on a procedure for challenging an arbitrator.

(2) (a) If a party intends to challenge an arbitrator he shall, within 15 days after becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of any circumstances referred to above, send a written statement of the reasons for the challenge to the Arbitral Tribunal.

(b) Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the Arbitral Tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure at (2) above if this article is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the High Court decides on the challenge which decisions shall be subject to no appeal.

7

Relevant Considerations for Identifying a suitable Arbitrator

☐ In order to decide upon a suitable arbitrator, consideration must be given as to what an arbitrator is being asked to do.

☐ Under Article 28, the Arbitral Tribunal is to:-

(a) Decide the dispute in accordance with such rules of law as are chosen by the parties as
applicable to the dispute.
(b) Decide the dispute in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

8

Relevant Considerations for Identifying a suitable Arbitrator

Consequently, it is preferable that an arbitrator appointed has experience of the industry which is the subject matter of the dispute.

It is open to the parties to agree that the appointment will be made by an industry body e.g. the Law Society, the Institute of Chartered Accountants etc.

If not, the default position is that the appointment will be made by the High Court.

When an arbitrator is appointed, assurance should be sought that the arbitrator will be in a position to progress the arbitration in a timely and efficient manner having regard to his existing commitments.